STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Fitzgerald, P.J., and Neff and White, J.J.

ALBERTA STUDIER, PATRICIA M. SANOCKI, MARY A. NICHOLS, LAVIVA M. CABAY, MARY L. WOODRING, AND MILDRED E. WEDELL,

Plaintiffs-Appellees,

v

MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, AND TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellants,

_____ /

Supreme Court No. 125766

Court of Appeals No. 243796

Ingham County Circuit Court
No. 00-92435-AZ

DEFENDANTS – APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

INTRODUCTION

The issue here is whether MCL 38.1391(1) created a contract that prohibited the Public School Employees' Retirement Board (Board) and the Michigan Department of Management and Budget (Department) from increasing the co-pays and deductibles paid by Plaintiff-Appellees' (Plaintiffs). (Plaintiffs' Brief, p 5)[1] Both this Court and the United States Supreme Court have held that a statute creates a contract, only; if the Legislature has unambiguously expressed an intention to create a contract; the statute is susceptible of no other reasonable construction; the Legislature covenants that the statute will not be amended; and the statute does not surrender an essential attribute of the State's sovereignty. *National Railroad Passenger Corp v Atchison, Topeka & Sante Fe Railway Co*, 470 US 451, 465-466; 105 S Ct 1441; 84 L Ed 2d 432 (1985); *United States Trust Co v New Jersey*, 431 US 1, 23; 97 S Ct 1505; 52 L Ed 2d 92 (1977); and *In re Certified Question*, 447 Mich 765, 777-778; 527 NW2d 468 (1994) *cert den* 514 US 1127 (1995). MCL 38.1391(1) does not create a contract because it does not require the Board and the Department to provide a health care plan (Plan) for retirees. Moreover, it does not prohibit the Board and the Department from including co-pays and deductibles in a Plan if they choose to authorize a Plan. Finally, MCL 38.1391(1) does not meet the criteria to be a statutory contract as set forth by the United States Supreme Court and this Court.

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[1] Plaintiffs argue in footnote 3 on page 3 of their Brief that the Defendants-Appellants (Defendants) cannot raise on appeal whether MCL 38.1391(1) created a contract because they did not raise this issue in the Court of Appeals. However, this Court has already ruled on this issue by granting the Defendants' Application for Leave to Appeal. Moreover, the Plaintiffs filed the Claim of Appeal in the Court of Appeals when the circuit court dismissed their complaint. In their Court of Appeals' Brief, the Defendants argued that MCL 38.1391(1) did not create a contract. The Court of Appeals affirmed the circuit court, but found that MCL 38.1391(1) created a contract. The Defendants have the right to seek review of that decision. MCR 7.301(2).

To determine the meaning of MCL 38.1391(1), the words of the statute must be reviewed and when the words are unambiguous, they must be applied as written. *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003). MCL 38.1391(1) is unambiguous. It does not require the establishment of a Plan that prohibits co-pays and deductibles. Instead of applying the holding in *Rakestraw* to MCL 38.1391(1), Plaintiffs argue that their health benefits were vested and, therefore, cannot be changed.[2] (Plaintiffs' Brief, p 6) However, Plaintiffs' health benefits are vested only if MCL 38.1391(1) created a contract. Plaintiffs assume that MCL 38.1391(1) created a contract without supporting that assumption by reference to *National Railroad Passenger Corp*, *United States Trust Co* or *In re Certified Question*. Since MCL 38.1391(1) did not create a contract, the Board and the Department can change the co-pays and deductibles paid by the Plaintiffs without violating the contract clauses of the United States and Michigan Constitutions.

STATEMENT OF PROCEEDINGS AND FACTS

This Court, in an order dated September 16, 2004, granted the Defendants' Application for Leave to Appeal the Court of Appeals' decision which found that MCL 38.1391(1) created a contract. The Defendants filed their Brief on Appeal on November 19, 2004 and the Plaintiffs filed their Brief on Appeal on December 22, 2004. The facts were thoroughly set out in those Briefs and in the Briefs filed in Docket No. 125765.

[2] Plaintiffs argue on page 2 of their Brief that the increases in co-pays and deductibles instituted by the Board and the Department in 2000 are the basis for their complaint, but co-pays and deductibles can be changed if no contract exists.

ARGUMENT

I. Plaintiffs do not have vested rights to health care benefits.

Plaintiffs argue that their health benefits are vested and, therefore, the Board and the Department may not change the co-pays and deductibles associated with their health benefits. (Plaintiffs' Brief, p 6). But case law establishes that Plaintiffs' rights are not vested unless MCL 38.1391(1) created a contract establishing those rights. Since MCL 38.1391(1) does not create a contract, Plaintiffs' rights to health care are not vested.

In *Detroit v Walker*, 445 Mich 682; 520 NW2d 135 (1994), the issue was whether 1988 PA 202 should be retroactively applied because it gave Detroit a new right to collect property taxes. The Court held that 1988 PA 202 could be retroactively applied because the defendant did not have a vested right under the prior statute and did not have title to the continuance of the old statute:

> [W]hen determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. [*Id.* at 699.]

The Court reiterated this concept by quoting from *Minty v Bd of State Auditors,* 336 Mich 370, 390; 58 NW2d 106 (1953):

> "It would seem that a right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another." [*Walker*, 445 Mich at 699.]

Here, Plaintiffs do not have a legal or equitable title to health benefits because MCL 38.1391(1) does not require MPSERS, the Board or the Department to provide health benefits, let alone health benefits without any increases in co-pays or deductibles. MCL 38.1391(1) is not mandatory but permissive. It states that the Board and the Department may authorize a Plan, but imposes no requirements on what the Plan must include and does not preclude the inclusion of

co-pays and deductibles. Plaintiffs' mere expectation that the Board and the Department will authorize a health care plan and that co-pays and deductibles under the Plan will remain unchanged does not create a vested right to such benefits.

In *Ohio Ass'n of Public School Emp v School Emp Retirement Sys*, 2004 Ohio 7101 (2004) (Attachment 1), a group of active and retired school employees sued when the retirement board increased the costs paid by retirees for health care coverage. The Court reviewed R.C.3309.69(B), which provided that the defendant "may" enter into an agreement with an insurance company for a health benefits policy and the defendant "may" contract for a "part or all of the cost of the coverage...." (Slip op, pp 9-10) The Court found, in part, that, since the statute provided that the defendant "may" provide for health care, the plaintiffs' health care coverage did not vest. (Slip op, pp 10-11)

Plaintiffs cite *Campbell v Judges' Retirement Bd*, 378 Mich 169; 143 NW2d 755 (1966) to support their position. In that case, the Legislature provided that a judge's retirement would be "one-half the amount currently being paid to circuit judges." *Id.* at 178. The plaintiffs voluntarily signed an agreement to become members of the retirement system and receive that retirement amount. *Id.* at 177, 179-180. The Legislature amended the statute to provide for a retirement allowance of one-half the salary being paid to a judge at the time of his retirement. Thereafter, the annual salary for judges increased but the plaintiffs' retirement amount did not similarly increase. *Id.* at 178. This Court held that a contract existed and, as a result, the plaintiffs' vested rights under that contract could not be impaired. *Id.* at 180-182.

MCL 38.1391(1) does not create a contract. Moreover, Plaintiffs did not voluntarily sign contracts with the State, unlike *Campbell*. As a result, this Court found that a contract existed,

however this Court did not find that the Judges' Retirement Act created a contract. Thus, *Campbell* is distinguishable.[3]

Ramey v Michigan Public Service Commission, 296 Mich 449; 296 NW 323 (1941) is also not applicable. There, Civil Service Commission Rule 17 granted vacation pay to the plaintiffs, however they were denied vacation pay because 1939 PA 97 amended the civil service act to eliminate vacation pay. This Court held that plaintiffs' rights to vacation pay were vested because they had met the terms of Rule 17. *Id.* at 461-462. MCL 38.1391(1) is different than Rule 17 because it does not guarantee health benefits. As a result, Plaintiffs' rights to health benefits did not vest and the Board and the Defendant could change the co-pays and deductibles in the Plan.

Plaintiffs cite to *Tyler v Livonia Public Schools*, 220 Mich App 697; 561 NW2d 390 (1996), *aff'd on other grounds* 459 Mich 382; 590 NW2d 560 (1999), for the principle that the Legislature could not amend "the statutory program for persons who were already disabled and whose rights.... had been vested...." (Plaintiffs' Brief, pp 12-13) As previously discussed, Plaintiffs' rights to health care have not "vested" because MCL 38.1391(1) did not guarantee their health benefits. Thus, *Tyler* is not applicable here.

In *Duncan v Retired Public Employees of Alaska, Inc*, 71 P3d 882 (2003), contrary to Plaintiffs' assertion, the Alaska Supreme Court did not have "to decide whether health benefits were, in effect, contractual in nature...." (Plaintiffs' Brief, p 14) In fact, the conclusion that retirement benefits were contractual was not "in dispute." *Id.* at 886. Instead the dispute was "whether the term 'accrued benefits' in article XII, Section 7 [of Alaska's Constitution] includes

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[3] Plaintiffs cite *Fletcher v Peck*, 10 US 87; 3 L Ed 162 (1810), for the proposition that statutes may create a contract. (Plaintiffs' Brief, fn 4, p 10) The Defendants do not dispute this; however, Plaintiffs have failed to establish that MCL 38.1391(1) created a contract under the criteria set forth by this Court. As a result, Plaintiffs did not acquire any vested rights to health care benefits.

heath insurance benefits...." *Id.* at 887. *Duncan* never discussed whether a statute created a contract. In contrast, the issue here is whether MCL 38.1391(1) created a contract. The Michigan Court of Appeals erred when it concluded that MCL 38.1391(1) created a contract because MCL 1391(1) does not meet any of the criteria established by this Court for a statutory contract.

II. MCL 38.1391(1) does not create a contract.

Plaintiffs argue that the facts in *National Railroad Passenger Corp* are different than the facts in this case and, thus, does not apply. (Plaintiffs Brief, p 19) Defendants cited *National Railroad Passenger Corp* because it set forth the standards that must be applied to determine if a statute creates a contract, not because the facts were similar. Those standards are applicable here since the issue is whether MCL 38.1391(1) created a contract. The Supreme Court found that the Rail Passenger Service Act of 1970 did not create a contract because it "does not contain a provision in which the United States '[covenants] and [agrees]' with anyone to do anything...." *Id.* at 470. Similarly in MCL 38.1391(1), the Legislature did not enter into a covenant or agree with anyone to do anything. Moreover, the Plaintiffs fail to establish how MCL 38.1391(1) guaranteed health benefits for themselves. Thus, MCL 38.1391(1) did not create a contract.[4]

On pages 19 and 20 of their Brief, Plaintiffs quote extensively from *National Railroad Passenger Corp* for the proposition that the government may not impair a contract that it enters into. The Defendants do not dispute this principle, however, here MCL 38.1391(1) did not create a contract, so the Defendants have not impaired it. Plaintiffs have failed to address how

[4] Plaintiffs refer on page 20 of their Brief to the "far stricter scrutiny required by *US Trust Co*" but fail to state what the standard is. In fact, in *US Trust Co v New Jersey*, 431 US 1, 18 fn 14; 97 S Ct 1505; 52 L Ed 2d 92 (1977), *reh den* 431 US 975; 97 S Ct 2942 (1977), the Court also concluded that a statute created a contract only "when the language and circumstances evidence a legislative intent to create private rights of a contractual nature...."

the language of MCL 38.1391(1) created a contract, but instead, have erroneously, assumed that it did.

Similarly, *Butler v Commonwealth of Pennsylvania*, 51 US 402; 10 HOW 402; 13 L Ed 472 (1851), is applicable because it supports the principle that the Plan is not a contract because MCL 38.1391(1) does not make it a contract. While *Butler* related to the pay required for future employment, the principle is the same; the Board and the Department can change the Plan because MCL 38.1391(1) does not create a contract that prohibits such changes.

Defendants cite *Spiller v Maine*, 627 A2d 513, 516 (1993), for the principle that a statute does not create a contract unless there is a clear indication of a legislative intent to do so. Here, MCL 38.1391(1) does not include a clear indication that the Legislature intended to create a contract. Thus, a contract was not created. While the Court in *Spiller* did not address the rights of those who qualified for retirement benefits, (*Id.* at 514) that does not change the fact that MCL 38.1391(1) did not create a contract. Moreover, just because the Court in *Spiller* found that retirees have certain expectations that cannot be taken away (*Id.* at 517) that does not mean that MCL 38.1391(1) created a contract that prevented the Board and the Department from increasing co-pays and deductibles.

Similarly, Defendants cite *In re Certified Question*, 447 Mich at 777-778 and *Romein v General Motors*, 436 Mich 515; 462 NW2d 555 (1990), for the principle that MCL 38.1391(1) does not meet the criteria for the creation of a contract. In both cases, this Court found that a statutory contract did not exist.

In summary, Plaintiffs do not establish how MCL 38.1391(1) created a statutory contract under the standards set forth by this Court. Thus, this Court should conclude that MCL 38.1391(1) did not create a contract.

III. Cases interpreting ERISA are not applicable

Plaintiffs cite to *Central Laborers' Pension Fund v Heinz*, 541 US 739; 124 S Ct 2230; 159 L Ed 2d 46 (2004) and *UAW v Yard-Man, Inc*, 716 F2d 1476 (CA 6, 1983), for the proposition that courts will protect retirement benefits. (Plaintiffs Brief, pp 24-28) However, both of these cases involve private retirement plans that are subject to the Employment Retirement Income Security Act (ERISA). Governmental retirement plans are specifically excluded from ERISA. 29 USC 1003; *Fromm v Principal Health Care of Iowa, Inc*, 244 F3d 652, 653 (CA 8, 2001) Thus, what a Court may do regarding an ERISA benefit is not applicable to whether MCL 38.1391(1) created a contract. While it may be true that if a private employer enters into a collective bargaining contract to provide retiree health benefits, the employer is required to do so, there is no evidence here that Plaintiffs entered into a contract with the State or anyone else.

Plaintiffs also cite to letters written by Governor Engler and the State Treasurer. (Plaintiffs' Brief, pp 26-27) The Governor's letter explained that Executive Order 1993-6, which used reserves to pay benefits, would not affect health care benefits. (PA 89a) The Treasurer's letter explained that proposed legislation regarding a defined contribution plan for MPSERS would not impact current employees because their pension benefits were protected. (PA 90a) Thus, neither letter established a contract that prevented the Board and the Department from increasing co-pays and deductibles in the Plan.

Finally, Plaintiffs cite to the Benefit Booklet given to retirees for the principle that retirees may rely on having health coverage. (Plaintiffs' Brief, p 27) Here, Plaintiffs are receiving health care coverage. Moreover, Plaintiffs do not dispute that the Michigan Public School Employees' Retirement System (MPSERS) pays the entire monthly premium for coverage. (Plaintiffs' Brief on Appeal in Docket 125765, p 43). Thus, the MPSERS provides the

benefits set forth in the Benefit Booklet however, the Booklet does not create a contract that co-pays and deductibles will remain unchanged forever.

IV. The Michigan Court of Appeal's clearly erroneous holding that MCL 38.1391(1) created a contract constitutes precedence under MCR 7.215(C)(2) and requires this Court's reversal.

The Court of Appeals found that MCL 38.1391(1) created a contract without applying the standards set out in *National Railroad Passenger Corp* and *In re Certified Question* for determining whether a statute creates a contract. In fact, the Court of Appeals only wrote one conclusory sentence, quoted by Plaintiffs, to make this finding. The Court of Appeals' decision, although clearly erroneous, is now precedent. MCR 7.215(C)(2). If that one sentence is enough to establish that MCL 38.1391(1) created a contract, then presumably other statutes that have similar language may be found to create a contract under the principle of stare decisis. Thus, this Court should reverse this decision of the Court of Appeals.

V. The position taken by different defendants in other cases does not bind the Defendants here.

Plaintiffs argue that the Defendants in this case are estopped from contending that MCL 38.1391(1) did not create a contract because of the positions taken by the defendants in *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995), *on rehearing* 450 Mich 574; 545 NW2d 346 (1996). (Plaintiffs' Brief, pp 29-32) This argument is not valid because the Plaintiffs' have previously admitted that the Defendants are not bound by the arguments made in *Musselman*. (See Plaintiffs' Brief on Appeal in Docket 125765, p 15) and *Hassberger v General Builders' Supply Co*, 213 Mich 489, 492-493; 182 NW 27 (1921)). Moreover, estoppel applied in *Hassberger* because the parties to the first case were the same parties in the second case. *Id.* at 496. Here, both the Plaintiffs and some of the Defendants are different than the parties in *Musselman*. Furthermore, estoppel may only apply "where the other party concedes the validity of a claim or defense, and there is a disposition on that basis to the detriment of the other

party...." *Allen v Garden Orchards, Inc*, 437 Mich 417, 431; 471 NW2d 352 (1991). This Court did not decide *Musselman* on the basis that MCL 38.1391(1) created a statutory contract to the detriment of the plaintiffs. Instead, it was assumed that health benefits were protected by Const 1963, art 1, § 10 and the issue in *Musselman* was whether health benefits were included within the phrase "accrued financial benefits" as found in Const 1963, art 9, § 24. A majority of this Court did not reach a decision on this issue. *Musselman,* 450 Mich at 577. Thus, estoppel does not prohibit the Defendants from arguing that MCL 38.1391(1) did not create a contract.

CONCLUSION

MCL 38.1391(1) did not create a contract because it does not meet the criteria set forth by this Court for establishment of a statutory contract. Thus, any health benefits provided to the Plaintiffs are not vested. Therefore, the Board and the Department could increase the co-pays and deductibles without violating the contract clauses of the Michigan and United States Constitutions.

Respectfully submitted,

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*2004 Ohio 7101, *; 2004 Ohio App. LEXIS 6540, **

Ohio Association of Public School Employees et al., Plaintiffs-Appellants, (Cross-Appellees), v. School Employees Retirement System Board et al., Defendants-Appellees, (Cross-Appellants).

No. 04AP-136

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2004 Ohio 7101; 2004 Ohio App. LEXIS 6540

December 28, 2004, Rendered

PRIOR HISTORY: [1]** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 03CVF07-8133).

DISPOSITION: Judgment was affirmed in part, reversed in part, and cause was remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants school employees' labor organization and 35 individuals sued appellees retirement system, its board members, and its director in the Franklin County Court of Common Pleas (Ohio) for, inter alia, breach of contract, promissory estoppel, breach of fiduciary duty, and injunctive relief regarding increases in the system's beneficiaries' health care costs. The trial court granted appellees' motion to dismiss, and appellants sought review.

OVERVIEW: School employees objected to a decision to make them bear more health coverage cost under their retirement plan. The appellate court held the coverage was a plan "benefit," under Ohio Rev. Code Ann. § 3309.01(O)(1), as employers' contributions funded it. The benefit was vested only if a payment was made to a beneficiary. Payments were made to an insurance company, rather than beneficiaries, so coverage did not vest, under Ohio Rev. Code Ann. § 3309.661, and the plan had the discretion under Ohio Rev. Code Ann. § 3309.69(B) to modify benefits. It was error to find "access" to coverage, as opposed to coverage, vested. The trial court did not have to give reasons for granting the motion to dismiss. As the claim of asset wasting was presumed true for purposes of a motion to dismiss, a breach of fiduciary duty claim was stated to the extent it was based on building a new building and paying salaries and bonuses. An exception to the rule against promissory estoppel claims against the state did not apply as promises appellants allegedly relied on were inconsistent with the plan's discretion to offer health care to retirees first and/or to reallocate costs or modify the plan.

OUTCOME: The trial court's judgment finding appellants access to health care coverage vested under the plan was reversed, as was its dismissal of appellants' breach of fiduciary duty claim based on wasting of assets due to building a new building and salaries and bonuses. Otherwise, the trial court's judgment was affirmed.

CORE TERMS: health care, coverage, retiree, vest, pension, retirement, promissory estoppel, motion to dismiss, estoppel, premium, matter of law, vesting, breach of fiduciary duty, assignment of error, assignments of error, entirety, retirement allowance, disability, recipient, discretionary authority, annuity, benefits provided, beneficiary, survivor, premised,

school employees, preliminary injunction, general rule, health insurance, overrule

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Issues of Fact & Law
HN1 An appellate court's review of issues of law is de novo. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN2 The state retirement systems, including the School Employees Retirement System, are creatures of statute and can only act in strict accordance with their enabling schemes. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN3 Ohio Rev. Code Ann. § 3309.661 defines what benefits of the School Employees Retirement System vest. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN4 See Ohio Rev. Code Ann. § 3309.661.

Governments > Legislation > Interpretation
Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN5 In ascertaining the meaning of Ohio Rev. Code Ann. § 3309.661, regarding the vesting of benefits of the School Employees Retirement System, an appellate court's primary concern is the legislative intent in enacting the statute. To determine the legislative intent, the court looks to the language of the statute itself. If a review of the statute conveys a meaning that is clear, unequivocal, and definite, the statute must be applied as written and the court need look no further. Courts do not have the authority to ignore the plain language of a statute under the guise of statutory interpretation or liberal or narrow construction. Rather, the court must give effect to the words used in the statute and not delete words that are used or insert words that are not used. The literal language of a statute must be enforced whenever possible. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN6 See Ohio Rev. Code Ann. § 3309.01(O)(1).

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN7 Only a "payment" made under the School Employees Retirement System can qualify as a benefit under the definition of a "benefit," in Ohio Rev. Code Ann. § 3309.01(O)(1). Except for a retirement allowance or annuity paid under Ohio Rev. Code Ann. § 3309.341, the source of the funds determines whether a particular payment is a benefit. If the payment is from the accumulated contributions of a member or an employer, or both, the payment is a benefit. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN8 The source of the funds for School Employees Retirement System (SERS) payments for health care coverage is reflected in Ohio Rev. Code Ann. § 3309.69(B), which grants SERS the discretionary authority to provide health care coverage. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems
HN9 See Ohio Rev. Code Ann. § 3309.69(B).

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN10 Ohio Rev. Code Ann. § 3309.60(B) creates the "employers' trust fund," in which school employers' contributions are held in trust for the payment of all pensions or other benefits provided by Ohio Rev. Code Ann. ch. 3309. Each year, the School Employees Retirement System (SERS) must determine the minimum annual compensation amount for each member that will be needed to fund the cost of providing future health care benefits. Ohio Rev. Code Ann. § 3309.491(A). SERS then determines each employer's minimum compensation contribution and applies those employer payments to the employers' trust fund for the purpose of funding future health care benefits. Ohio Rev. Code Ann. § 3309.491 (C). More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN11 Because the employers' accumulated contributions to the School Employees Retirement System fund the payments for the health care plan, these payments are "benefits" for purposes of Ohio Rev. Code Ann. § 3309.661. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN12 Ohio Rev. Code Ann. § 3309.661 expressly provides that the granting of a retirement allowance, annuity, pension, or other benefit to any person pursuant to action of the School Employees Retirement System (SERS) board vests a right in such person to receive such retirement allowance, annuity, pension, or benefit. This language is clear, unequivocal and definite. Because the word "benefit" is defined in Ohio Rev. Code Ann. § 3309.01(O)(1) as a "payment" (from a particular funding source), vesting occurs only if the payment is granted to a SERS retiree or beneficiary. SERS does not grant payments for health care coverage to SERS retirees or beneficiaries. Rather, SERS makes payments to an insurance company which, in turn, provides health care coverage for the benefit of SERS retirees or beneficiaries. Therefore, although payments for health care coverage are benefits, they are benefits that do not vest under Ohio Rev. Code Ann. § 3309.661. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN13 The definition of a benefit, in Ohio Rev. Code Ann. § 3309.01(O)(1), for a beneficiary of the School Employees Retirement System (SERS) does not require that payment be to a retiree. However, simply because payments for health care coverage, under SERS, are benefits does not mean they are vested benefits. More Like This Headnote

Governments > Legislation > Interpretation

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN14 Retirement statutes must be liberally construed in favor of the public employees and their dependents who the statutes were designed to protect. However, there is no need to liberally construe or interpret a statute when its meaning is clear and unambiguous. Ohio Rev. Code Ann. § 3309.661 simply does not extend vesting to payments to beneficiaries of the School Employees Retirement System for health care coverage. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN15 The conclusion that payments for School Employees Retirement System (SERS) beneficiaries' health care coverage do not vest under Ohio Rev. Code Ann. § 3309.661 is consistent with the broader statutory scheme governing SERS. First,

Ohio Rev. Code Ann. § 3309.69(B) states that SERS "may," not "shall," provide health care coverage. Given this discretionary language, it is in SERS's discretion whether to offer any particular type of health care coverage, or any health care coverage at all. Further, SERS is not required to maintain any reserves for health care coverage. Health care coverage is funded entirely through residual amounts left over after SERS actuaries account for the funding and reserve levels necessary for SERS to provide the statutorily mandated pension, disability, and survivor benefit payments to its retirees. Therefore, if payments for health care coverage vest, there is no guaranteed funding mechanism in place. Moreover, the payments cannot be funded by continually increasing the amount of the employers' contributions because employer contributions are capped. Ohio Rev. Code Ann. § 3309.491. Lastly, it would be extremely difficult for SERS to maintain and administer an unchanging health care plan for each retiree (locked in at the time of retirement) given the unpredictability of costs and the constantly evolving coverages that are available in the marketplace. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN16 The School Employees Retirement System (SERS) is required to pay pension, disability, and survivor benefits, and there is a statutory mechanism in place to guarantee those payments. Further, SERS's original and primary mission is to provide school retirees with pensions, disability, and survivor benefits. The general assembly fixed the nature and amount of these payments and the type and nature of the employer and employee contributions needed to support these payments. SERS is required to maintain monetary reserves to guarantee pension, survivor, and disability payments into the future. Not surprisingly, SERS's pension, disability and survivor payments do vest under Ohio Rev. Code Ann. § 3309.661. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN17 Other provisions in Ohio Rev. Code Ann. ch. 3309 which impose mandatory obligations on the School Employees Retirement System in connection with other insurance coverage matters are not relevant in determining whether a health care plan purchased pursuant to Ohio Rev. Code Ann. § 3309.69(B) vests. More Like This Headnote

Pensions & Benefits Law > Government Employee Retirement > State Employee Retirement Systems

HN18 Regardless of whether the School Employees Retirement System must provide retirees "access" to other forms of health insurance, access to a health care plan granted pursuant to Ohio Rev. Code Ann. § 3309.69(B) is not a vested right under Ohio Rev. Code Ann. § 3309.661. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

Civil Procedure > Trials > Bench Trials

HN19 A trial court is not required to specifically enumerate and explain the basis for granting an Ohio R. Civ. P. 12(B)(6) motion to dismiss. In fact, the trial court has no obligation to issue a written opinion when granting a Rule 12(B)(6) motion to dismiss. In addition, when a trial court dismisses a complaint pursuant to Rule 12 (B)(6), it cannot make any findings, factual or otherwise, beyond its legal conclusion that the complaint fails to state a claim upon which relief can be granted. Thus, the trial court does not assume the role of fact finder and has no duty to issue findings of fact and conclusions of law. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

HN20 When an Ohio R. Civ. P. 12(B)(6) motion is granted, it is presumed the trial court

found that the plaintiff failed to state a claim. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

HN21 A complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In considering dismissal under Ohio R. Civ. P. 12 (B)(6), a trial court must presume all the material allegations to be true, must resolve all doubt and inferences in the plaintiff's favor, and must view all allegations in the complaint in the light most favorable to the plaintiff. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

HN22 An appellate court's standard of review on the issue of granting or denying an Ohio R. Civ. P. 12(B)(6) motion to dismiss is de novo. More Like This Headnote

Contracts Law > Consideration > Promissory Estoppel

Governments > State & Territorial Governments > Claims By & Against

HN23 As a general rule, promissory estoppel does not apply against the state, its agencies, arms and agents. The reasons for this general rule are apparent. A properly functioning government cannot tolerate individual state actors binding the state to actions that exceed or contravene its authority. More Like This Headnote

Contracts Law > Consideration > Promissory Estoppel

Governments > State & Territorial Governments > Claims By & Against

HN24 The rationale for the general rule forbidding estoppel from being asserted against the state is absent when the application of estoppel would lead to compliance with the law rather than contrary to it. More Like This Headnote

COUNSEL: Buckley King, LPA, Robert J. Walter and Donell R. Grubbs, for plaintiffs-appellants.

Jim Petro, Attorney General; Jones Day, Michael R. Gladman and Brian G. Selden, special counsel for defendants-appellees.

JUDGES: BOWMAN and McCORMAC, JJ., concur.

OPINIONBY: KLATT

OPINION: REGULAR CALENDAR

KLATT, J.

[*P1] Plaintiffs-appellants, Ohio Association of Public School Employees-AFSCME, Local 4, AFL-CIO ("OAPSE"), and 35 individuals (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas dismissing their claims against defendants-appellees School Employees Retirement System ("SERS"), its individual board members and its executive director (collectively "appellees") pursuant to appellees' Civ.R. 12(B)(6) motion to dismiss. For the following reasons, we affirm in part and reverse in part that judgment.

[*P2] OAPSE is an employee organization that has among its purposes the representation of active non-teaching school employees.

[*P3] Appellants Joann Johntony, Linda **[**2]** Mobley, Sandra Wheeler, Mary Ann Howell, Betty Simmons-Talley, Mary DeVine, Rosella Tope, David Hamilton, William Higgins, Mary Beth Thompson, William Hurlow, Sylvia Holmes, Vicky Laub, Christine Holland, Deborah Weihrauch, Debra Basham, Hoberta Roach, Barbara Ward, Geneva Bates, Mary Blevins, Pam Dolence, and Norma Scholsser ("employee-appellants") are public school employees and are active employee members of SERS. As such, they have an amount equal to ten percent of their income deducted from their gross salaries for each payroll period as a contribution towards the cost of retirement benefits, not including health care insurance.

[*P4] Appellants Grace M. Nagel, Julia K. Martin, Bonnie B. Clark, Betty H. Harris, Sally Steagall, Dorothy C. Fannin, Anna M. Stegman, Catherine M. Clouse, Bernice L. Close, and Lee H. Martin ("retiree-appellants") are retired school employees, retirants of SERS, who are currently receiving retirement allowances and health care coverage from SERS.

[*P5] Appellee SERS is a public entity authorized to operate and maintain the retirement system on behalf of all non-certified/non-licensed public school employees in Ohio in accordance with Chapter 3309 of the Ohio Revised Code. **[**3]**

[*P6] With few exceptions, non-certified/non-licensed public school employees are required by law to contribute to SERS--currently at the rate of ten percent of their gross earnings. Employee contributions are forwarded to SERS and applied to the employees' savings fund. Employers are also required to make contributions to SERS--currently at the rate of 14 percent of the employees' gross earnings, plus any additional contributions required under R.C. 3309.491 (the employers' surcharge). Employer contributions are forwarded to SERS and applied to the employers' trust fund.

[*P7] The general administration and management of SERS is vested in the SERS board, which is composed of appellees auditor of state, attorney general, four SERS employee members (Jeannie Knox, Barbara Overholser, Barbara Miller, and Darlene Mulholland), and one retiree (Orris Fields) who is a recipient of SERS service or disability retirement benefits. The SERS board is a fiduciary of the funds created by R.C. 3309.60, including the employees' savings fund and the employers' trust fund.

[*P8] Appellee Thomas Anderson **[**4]** is the executive director of SERS. He is employed pursuant to R.C. 3309.11 and is authorized, among other things, to act for the SERS board in accordance with the board's policies.

[*P9] Retirees and disability benefit recipients of SERS are persons who have either met the age and eligibility requirements for service retirement, or became eligible to receive a disability retirement. Retirees and disability benefit recipients paid SERS contributions during the period of their employment in an amount up to ten percent of their earnings, depending on the law applicable at the time they were employed. When an SERS member dies before retirement, qualified beneficiaries of the member may become eligible for monthly survivor benefits from SERS, including health care coverage.

[*P10] For many years, SERS has provided a health care plan for retirees in addition to paying pensions, disability benefits and survivor benefits. n1 Prior to 1989, all SERS members who retired from covered employment and qualified for SERS pension benefits also received free health care coverage from SERS, in addition to their pension. After 1989, retirees with at least 25 years **[**5]** of service credit with SERS, regardless of their age upon retirement, received free health care coverage. Retirees with less than 25 years of service credit were eligible for health care coverage from SERS in addition to their pension, but, they were required to pay between 5 percent and 75 percent of the monthly premiums. The percentage they were required to pay depended upon their years of service credit.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Health care for active employees is provided by local school district employers, not SERS.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[*P11] On July 16, 2003, SERS approved a number of changes to the costs and scope of the health care plan it would provide to its members. These changes were to take effect on January 1, 2004. The changes included the requirement that all SERS retirees pay at least 15 percent of the premium cost for health care coverage. This minimum premium requirement applied to all currently retired and disabled SERS benefit recipients, regardless of the date on which the SERS member retired or became disabled and regardless **[**6]** of whether they presently pay any portion of the premium for their health care coverage.

[*P12] In addition, SERS changed the benefits provided under its health care plan and it increased co-pay amounts and out-of-pocket maximum requirements. These changes, coupled with the increased premium contributions, shifted a greater percentage of the health insurance costs to retiree and disability recipients. SERS undertook these changes to protect and preserve its health care fund in the face of rising health care costs and lower investment returns.

[*P13] In response to the changes SERS made to its health care plan, appellants filed suit against appellees seeking declaratory, injunctive, and other legal and equitable relief. The complaint set forth six separate claims for relief: (1) declaratory judgment; (2) breach of contract/specific performance; (3) promissory estoppel; (4) unconstitutional taking; (5) breach of fiduciary duty; and (6) injunctive relief.

[*P14] Subsequently, appellants filed a motion and application for preliminary injunction and request for an evidentiary hearing. On that same day, appellees filed a motion to dismiss appellants' complaint. The trial **[**7]** court referred both motions to a magistrate pursuant to Civ.R. 52 and Loc.R. 99.02. The magistrate elected to address appellees' motion to dismiss first.

[*P15] On December 4, 2003, the magistrate issued a decision recommending that the trial court deny appellees' motion to dismiss except for: (1) any claim premised on the breach of a non-vested contractual right to specific health care coverage and; (2) any breach of fiduciary duty claim premised upon SERS's alleged wasting of SERS funds in constructing its new office building and in paying unreasonable and excessive salaries to SERS employees.

[*P16] Appellees timely filed objections to the magistrate's decision with the trial court. Appellants also filed objections to that portion of the magistrate's decision that recommended dismissal of appellants' breach of fiduciary duty claims.

[*P17] In the meantime, the magistrate conducted an evidentiary hearing pursuant to appellants' motion for preliminary injunction. On December 31, 2003, the magistrate issued a decision granting appellants' motion for preliminary injunction. Thereafter, appellants filed a motion, pursuant to Civ.R. 53(E) **[**8]** , seeking an order from the trial court granting a preliminary injunction consistent with the magistrate's decision. That motion was granted on January 2, 2004, and was effective for a period of ten days.

[*P18] On January 12, 2004, the trial court issued an interim decision in which it rejected the magistrate's December 4, 2003 decision in its entirety and vacated its January 2, 2004 interim order granting the preliminary injunction. The trial court also granted appellees' Civ.R. 12(B)(6) motion to dismiss, stating that an opinion would follow.

[*P19] On January 23, 2004, the trial court issued its decision sustaining appellees' objections to the magistrate's decision and dismissing appellants' complaint in its entirety for failure to state a claim. The trial court determined that: (1) health care coverage is a benefit under Chapter 3309 and the rules promulgated thereunder; (2) "access" to group health care coverage vests; (3) such vesting does not lock in costs or levels of coverage for SERS retirees or members; and (4) SERS has the authority to change costs and levels of health care coverage. Although the trial court did not specifically address **[**9]** each cause of action alleged in appellants' complaint, the trial court resolved all claims in favor of appellees as a matter of law and, therefore, dismissed the complaint.

[*P20] Appellants appeal, assigning the following errors:

> [1.] The Court of Common Pleas erred in rejecting the Magistrate's Decision and in granting SERS' motion to dismiss the Complaint pursuant to Civ. R. 12(B)(6).
>
> [2.] The Court of Common Pleas erred in finding that, as a matter of law, premium costs and levels of coverage for health care benefits provided to SERS retirees do not vest, but rather may be changed by the SERS Board.
>
> [3.] The Court of Common Pleas erred as a matter of law in dismissing the entirety of the Complaint without ruling upon each separately pleaded claim thereof.
>
> [4.] The Court of Common Pleas erred, as a matter of law and contrary to Civ.R. 53(E)(4)(b), in dismissing the entirety of the Complaint without ruling upon each objection raised by the parties to the Magistrate's Decision of December 4, 2003.

[*P21] Appellees also filed a cross-appeal assigning the following assignment of error:

> To **[**10]** the extent that the trial court determined that SERS must provide access to a group health care plan and that such access to group health care coverage vests upon its granting, the trial court erred.

[*P22] For ease of analysis, we will address appellants' assignments of error out of order. Appellants contend in their second assignment of error that the trial court erred in finding as a matter of law that premium costs and levels of health care coverage provided to SERS retirees at the time of their retirement do not vest under R.C. 3309.661 and, therefore, may be changed. This assignment of error is closely related to appellees' cross-appeal, in which appellees allege that the trial court erred in finding that "access" to health care coverage (as distinguished from premium costs and levels of coverage) vests once coverage is provided. Therefore, we will address appellants' second assignment of error and appellees' cross-appeal together. HN1 Our review of issues of law is de novo. *Cleveland Elec. Illuminating Co. v. PUC* (1996), 76 Ohio St. 3d 521, 523, 1996 Ohio 298, 668 N.E.2d 889.

[*P23] HN2 The state retirement systems, including SERS, are creatures **[**11]** of statute and can only act in strict accordance with their enabling schemes. *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St. 3d 67, 74, 1998 Ohio 424, 697 N.E.2d 644. Therefore, we must look to the statutes governing SERS to determine whether a health care plan provided to SERS retirees is subject to vesting.

[*P24] HN3 R.C. 3309.661 defines what SERS benefits vest. R.C. 3309.661 provides:

> HN4 The granting of a retirement allowance, annuity, pension, or other benefit to any person pursuant to action of the school employees retirement board vests a right in such person, so long as he remains the recipient of any of the funds established by section 3309.60 of the Revised Code, to receive such retirement allowance, annuity, pension, or benefit. Such right shall also be vested with equal effect in the recipient of a grant heretofore made from any of the funds named in section 3309.60 of the Revised Code.

[*P25] HN5 In ascertaining the meaning of R.C. 3309.661, our primary concern is the legislative intent in enacting the statute. **[**12]** *State ex rel. Auglaize Mercer Community Action Comm., Inc. v. Ohio Civ. Rights Comm.* (1995), 73 Ohio St. 3d 723, 726, 1995 Ohio 180, 654 N.E.2d 1250. To determine the legislative intent, we look to the language of the statute itself. *Columbus City School Dist. Bd. of Edn. v. Wilkins*, 101 Ohio St. 3d 112, 2004 Ohio 296, at P26. If a review of the statute conveys a meaning that is clear, unequivocal, and definite, the statute must be applied as written and the court need look no further. *Wilkins*, supra; *Golden Christian Academy v. Zelman* (2001), 144 Ohio App. 3d 513, 520, 760 N.E.2d 889. "Courts do not have the authority to ignore the plain language of a statute under the guise of statutory interpretation or liberal or narrow construction." *State ex rel. Massie v. Gahanna-Jefferson Pub. Schools Bd. of Edn.* (1996), 76 Ohio St. 3d 584, 588, 669 N.E.2d 839. Rather, we must give effect to the words used in the statute and not delete words that are used or insert words that are not used. *Campbell v. Burton* (2001), 92 Ohio St. 3d 336, 341, 2001 Ohio 206, 750 N.E.2d 539. The literal language of a statute must be enforced whenever possible. *Cablevision of the Midwest, Inc. v. Gross* (1994), 70 Ohio St. 3d 541, 544, 1994 Ohio 505, 639 N.E.2d 1154. **[**13]**

[*P26] The first question we must address is whether payments for health care coverage are "benefits" as contemplated in R.C. 3309.661. The term "benefit" is specifically defined in R.C. 3309.01(O)(1):

> HN6 "Benefit" means a payment, other than a retirement allowance or the annuity paid under section 3309.341 [3309.34.1] of the Revised Code, payable from the accumulated contributions of the member or the employer, or both, under this chapter and includes a disability allowance or disability benefit.

Thus, HN7 only a "payment" can qualify as a benefit under this definition. Except for a retirement allowance or annuity paid under R.C. 3309.341, the source of the funds determines whether a particular payment is a benefit. If the payment is from the accumulated contributions of the member or the employer, or both, the payment is a benefit.

[*P27] Here, HN8 the source of the funds for SERS payments for health care coverage is reflected in R.C. 3309.69(B), which grants SERS the discretionary authority to provide health care coverage. R.C. 3309.69(B) **[**14]** states in relevant part:

> HN9 The school employees retirement board may enter into an agreement with insurance companies, health insuring corporations, or government agencies authorized to do business in the state for issuance of a policy or contract of health, medical, hospital, or surgical benefits, or any combination thereof, for those individuals receiving service retirement or a disability or survivor benefit subscribing to the plan and their eligible dependents.

> * * *
>
> The board may contract for coverage on the basis of part or all of the cost of the coverage to be paid from appropriate funds of the school employees retirement system. *The cost paid from the funds of the system shall be included in the employer's contribution rate provided by sections 3309.49* and 3309.491 [3309.49.1] of the Revised Code. The board shall not pay or reimburse the cost for health care under this section or section 3309.375 [3309.37.5] of the Revised Code for any ineligible individual.

(Emphasis added.)

[*P28] In turn, HN10 R.C. 3309.60(B) creates the "employers' trust **[**15]** fund," in which school employers' contributions are held in trust for the payment of all pensions "or other benefits provided by this chapter." Each year, SERS must determine the minimum annual compensation amount for each member that will be needed to fund the cost of providing future health care benefits. R.C. 3309.491(A). SERS then determines each employer's minimum compensation contribution and applies those employer payments to the employers' trust fund for the purpose of funding future health care benefits. R.C. 3309.491 (C).

[*P29] Accordingly, HN11 because the employers' accumulated contributions fund the payments for the health care plan, we conclude that these payments are "benefits" for purposes of R.C. 3309.661. n2

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00n2 Chapter 3309 of the Revised Code also contains a number of other references to health care coverage as a benefit. For example, R.C. 3309.341(E) refers to certain SERS retirees who are "not eligible to receive health, medical, hospital, or surgical benefits under section 3309.69 of the Revised Code * * *." Similarly, R.C. 3309.375 contains several references to "hospital insurance benefits," and R.C. 3309.88, which pertains to defined contribution plans, refers to "health care benefits provided under section 3309.375 or 3309.69 of the Revised Code * * *." These references are consistent with the general view that health insurance coverage is a benefit when provided by a third party.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**16]**

[*P30] Next, we must determine whether these benefits vest. HN12 R.C. 3309.661 expressly provides that "the granting of a retirement allowance, annuity, pension, or other *benefit to any person* pursuant to action of the [SERS board] vests a right in such person, * * * to receive such retirement allowance, annuity, pension, or benefit." (Emphasis added.) We find that this language is clear, unequivocal and definite. Because the word "benefit" is defined in R.C. 3309.01(O)(1) as a "payment" (from a particular funding source), vesting occurs only if the payment is granted *to* a SERS retiree or beneficiary. Here, SERS does not grant payments for health care coverage to SERS retirees or beneficiaries. Rather, SERS makes payments to an insurance company which, in turn, provides health care coverage for the benefit of SERS retirees or beneficiaries. Therefore, although payments for health care coverage are benefits, they are benefits that do not vest under R.C. 3309.661.

[*P31] Appellants argue that HN13 the definition of a benefit does not require that

payment be to a retiree. We agree. However, simply **[**17]** because payments for health care coverage are benefits does not mean they are vested benefits. Appellants also emphasize the well-settled principle that HN14 retirement statutes "must be liberally construed in favor of the public employees and their dependents who the statutes were designed to protect." *State ex rel. Mallory v. Pub. Emp. Retirement Bd.* (1998), 82 Ohio St. 3d 235, 240, 694 N.E.2d 1356. However, there is no need to liberally construe or interpret a statute when its meaning is clear and unambiguous. *Lake Hosp. Sys. v. Ohio Ins. Guar. Ass'n* (1994), 69 Ohio St. 3d 521, 525, 1994 Ohio 330, 634 N.E.2d 611; *State ex rel. Jones v. Conrad* (2001), 92 Ohio St. 3d 389, 392, 2001 Ohio 207, 750 N.E.2d 583. Here, R.C. 3309.661 simply does not extend vesting to payments for health care coverage.

[*P32] HN15 Our conclusion that payments for health care coverage do not vest under R.C. 3309.661 is also consistent with the broader statutory scheme governing SERS. First, R.C. 3309.69(B) states that SERS "may," not "shall," provide health care coverage. Given this discretionary language, it is in SERS's discretion whether to offer any particular **[**18]** type of health care coverage, or, as appellants concede, any health care coverage at all. See *Bigler v. York Twp.* (1993), 66 Ohio St. 3d 98, 100, 609 N.E.2d 529 (using the word "may" in a statute creates a discretionary power that a grantee "is not obligated" to use). Further, SERS is not required to maintain any reserves for health care coverage. Health care coverage is funded entirely through residual amounts left over after SERS actuaries account for the funding and reserve levels necessary for SERS to provide the statutorily mandated pension, disability, and survivor benefit payments to its retirees. Therefore, if payments for health care coverage vest as appellants argue, there is no guaranteed funding mechanism in place. Moreover, the payments cannot be funded by continually increasing the amount of the employers' contributions because, as appellees point out, employer contributions are capped. R.C. 3309.491. Lastly, as a practical matter, it would be extremely difficult for SERS to maintain and administer an unchanging health care plan for each retiree (locked in at the time of retirement) given the unpredictability of costs and the constantly evolving **[**19]** coverages that are available in the marketplace.

[*P33] In contrast, HN16 SERS is required to pay pension, disability, and survivor benefits and there is a statutory mechanism in place to guarantee those payments. See, generally, R.C. 3309.36 (member "shall be granted a retirement allowance"); R.C. 3309.40 ("upon disability retirement, a member shall receive an annual amount that shall consist of * * *"); R.C. 3309.454 (survivor benefit payments "shall begin with the month subsequent to the member's death"). Further, we note that SERS's original and primary mission is to provide school retirees with pensions, disability, and survivor benefits. The General Assembly fixed the nature and amount of these payments and the type and nature of the employer and employee contributions needed to support these payments. SERS is required to maintain monetary reserves to guarantee pension, survivor, and disability payments into the future. Not surprisingly, SERS's pension, disability and survivor payments do vest under R.C. 3309.661.

[*P34] The trial court drew a distinction between the vesting of specific health **[**20]** care plan features (and the costs associated therewith), and the vesting of "access" to health care coverage. The trial court found that, although costs and specific health care plan features did not vest under R.C. 3309.661, "access" to health care coverage did vest. In reaching this conclusion, the trial court relied upon a number of other provisions in Chapter 3309 and several related administrative code provisions that require SERS to establish insurance programs, make certain coverages available and/or make certain payments relating to a retiree's eligibility for Medicare. See, e.g., R.C. 3309.375 (Medicare equivalent benefits); R.C. 3309.691 (Program for participation in contracts for long term health care insurance); Ohio Adm.Code 3309-1-35 (Health care and Medicare "B"). We disagree with the trial court's conclusion for two reasons.

[*P35] First, the parties did not dispute that SERS negotiated and purchased the health insurance plan at issue here pursuant to R.C. 3309.69(B). The parties also do not dispute that SERS's authority to purchase **[**21]** this health care coverage in the first instance was discretionary. What is at issue is the consequence of SERS's exercise of that discretionary authority. HN17 Other provisions in Chapter 3309 which impose mandatory obligations on SERS in connection with other insurance coverage matters are not relevant in determining whether a health care plan purchased pursuant to R.C. 3309.69(B) vests.

[*P36] Second, the specific issue before the trial court was not whether retirees were entitled to access to health insurance benefits. The parties did not dispute that SERS retirees and beneficiaries had access to a health care plan. Rather, what they disputed was whether the specific cost structure and level of benefits provided by SERS's health care plan were vested under R.C. 3309.661. As we previously determined, because SERS did not grant payments for health care coverage to retirees or beneficiaries, this benefit did not vest. Moreover, HN18 regardless of whether SERS must provide retirees "access" to other forms of health insurance, access to a health care plan granted pursuant to R.C. 3309.69(B) is not a vested right **[**22]** under R.C. 3309.661.

[*P37] Accordingly, we overrule appellant's second assignment of error and sustain the sole assignment of error in appellee's cross appeal.

[*P38] Appellants contend in their fourth assignment of error that the trial court erred by failing to specifically address their objections to the magistrate's December 4, 2003 decision. We disagree.

[*P39] Appellants' objections to the magistrate's December 4, 2003 decision related solely to the dismissal of their claim for breach of fiduciary duty. Because the trial court rejected the magistrate's decision in its entirety pursuant to Civ.R. 53(E)(4)(b), appellants were not prejudiced by the trial court's failure to address their specific objections. We recognize that the trial court went on to dismiss all of appellants' claims, including their claim for breach of fiduciary duty. Appellants challenge that aspect of the trial court's decision in their first and third assignments of error, and we will address those arguments below. Accordingly, appellants' fourth assignment of error is overruled.

[*P40] Appellants' first and third assignments of error **[**23]** are related and, therefore, we address them together. Essentially, appellants contend that the trial court erred by dismissing the complaint in its entirety and by dismissing the complaint without ruling on each specific cause of action contained therein.

[*P41] As a preliminary matter, we note that HN19 a trial court is not required to specifically enumerate and explain the basis for granting a Civ.R. 12(B)(6) motion to dismiss. In fact, the trial court has no obligation to issue a written opinion when granting a Civ.R. 12 (B)(6) motion to dismiss. *Thompson v. Cent. Ohio Cellular, Inc.*, (1994), 93 Ohio App. 3d 530, 538, 639 N.E.2d 462; see, also, *Vrabel v. Vrable* (1983), 9 Ohio App. 3d 263, 272, 9 Ohio B. 477, 459 N.E.2d 1298. In addition, when a trial court dismisses a complaint pursuant to Civ.R. 12(B)(6), it cannot make any findings, factual or otherwise, beyond its legal conclusion that the complaint fails to state a claim upon which relief can be granted. Thus, the trial court does not assume the role of fact finder and has no duty to issue findings of fact and conclusions of law. *State ex rel. Drake v. Athens Cty. Bd. of Elections* (1988), 39 Ohio St. 3d 40, 41, 528 N.E.2d 1253; **[**24]** *Mayer v. Bristow* (2000), 91 Ohio St. 3d 3, 16, 740 N.E.2d 656; *State ex rel. Grove v. Nadel* (1998), 81 Ohio St. 3d 325, 327, 1998 Ohio 624, 691 N.E.2d 275; *Sturgill v. Village of Lockbourne* (Oct. 28, 1997), Franklin App. No. 97APE01-139, 1997 Ohio App. LEXIS 4830.

[*P42] HN20 When a Civ.R. 12(B)(6) motion is granted, it is presumed the trial court

found that the plaintiff failed to state a claim. Therefore, in the case at bar, the trial court did not err solely because it failed to specifically enumerate and explain the basis for granting appellees' Civ.R. 12(B)(6) motion to dismiss. However, because the complaint alleged multiple causes of action, we must examine each claim separately to determine whether appellants pled sufficient facts to withstand a Civ.R. 12(B)(6) motion to dismiss.

[*P43] HN21 A complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *State ex rel. Jennings v. Nurre* (1995), 72 Ohio St. 3d 596, 597, 1995 Ohio 280, 651 N.E.2d 1006. In considering dismissal under Civ.R. 12(B)(6), the trial **[**25]** court must presume all the material allegations to be true, must resolve all doubt and inferences in the plaintiff's favor, and must view all allegations in the complaint in the light most favorable to the plaintiff. *State ex rel. Longacre v. Penton Publishing Co.* (1997), 77 Ohio St. 3d 266, 267, 1997 Ohio 276, 673 N.E.2d 1297; *Fahnbulleh v. Strahan* (1995), 73 Ohio St. 3d 666, 667, 1995 Ohio 295, 653 N.E.2d 1186. Moreover, HN22 our standard of review on this issue is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St. 3d 79, 2004 Ohio 4362, at P5.

[*P44] Appellants' complaint contains six separate claims for relief: (1) declaratory judgment; (2) breach of contract/specific performance; (3) promissory estoppel; (4) unconstitutional taking; (5) breach of fiduciary duties; and (6) injunctive relief. n3 Appellants' claims for declaratory judgment, breach of contract/specific performance, unconstitutional taking and injunctive relief are all premised on the assertion that SERS's health care plan vests pursuant to R.C. 3309.661 and/or that SERS could not lawfully reallocate costs and modify plan benefits. For the reasons previously discussed, we have determined as a matter of **[**26]** law that SERS's payments for the health care plan at issue here do not vest under R.C. 3309.661. Furthermore, because the health care plan at issue here was provided pursuant to SERS's discretionary authority under R.C. 3309.69(B) and, because this benefit does not vest, we find as a matter of law that SERS retains discretion to reallocate costs and/or to modify benefits provided under the plan. Therefore, we conclude that these claims were appropriately dismissed for failure to state a claim.

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n3 Appellees argue in their brief that OAPSE and the employee-appellants lack standing to bring these claims. The magistrate determined that these appellants had standing. The trial court rejected the magistrate's decision without addressing the issue of standing. Because appellees did not assert a cross-assignment of error based on lack of standing and failed to assert lack of standing in their cross-appeal, we decline to address this issue.

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[*P45] Likewise, to **[**27]** the extent that appellants' breach of fiduciary duty claim is premised on the alleged vesting of health care benefits granted pursuant to R.C. 3309.69(B), that claim also fails to state a claim as a matter of law. However, appellants' breach of fiduciary duty claim is also based on allegations that go beyond the issue of vesting. Specifically, appellants allege in paragraph 61 of the complaint that appellees breached their fiduciary duties by:

> (E) Wasting assets of the SERS funds in their care and abusing their discretionary authority over the administration of SERS funds by incurring and approving unnecessary expenses for the construction of a new SERS administration building; and

(F) Wasting assets of the SERS funds in their care and abusing their discretionary authority over the administration of SERS funds by incurring and approving unreasonable and excessive increases in salary and bonuses for Defendant Anderson and other SERS employees.

[*P46] Because we must presume these allegations to be true for purposes of a Civ.R. 12 (B)(6) motion to dismiss, we find that appellants have stated a claim for breach of fiduciary **[**28]** duties to the extent their claim is based on: (1) the alleged wasting of SERS's funds in connection with the construction of the new SERS administration building; and (2) the alleged payment of unreasonable and excessive salary and bonuses to its executive director and other SERS employees. Accordingly, we find that the trial court erred by dismissing this claim in its entirety. n4

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n4 Appellants also allege that appellees breached their fiduciary duty to appellants by depriving them of the benefit of their bargain of employment for receipt of free health care for life and/or for the receipt of low cost health care for life, with monthly premium subsidies of between 25 percent and 75 percent. Complaint at paragraph 61(C) and (D). These allegations are essentially indistinguishable from appellants' promissory estoppel claim. Therefore, we address them as part of our analysis of that cause of action.

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[*P47] Lastly, in count three of the complaint, appellants assert a claim for promissory estoppel. Appellants **[**29]** allege that SERS representatives promised them that the percentages of premium costs appellants would pay upon retirement, whether from 0 percent to 75 percent, would not change. Appellants allege they relied on these promises to their detriment. Therefore, appellants argue that appellees should be estopped from raising appellants' out-of-pocket costs and from reducing the level of health care coverage.

[*P48] HN23 As a general rule, promissory estoppel does not apply against the state, its agencies, arms and agents. *Sun Refining Marketing Co. v. Brennan* (1987), 31 Ohio St. 3d 306, 307, 31 Ohio B. 584, 511 N.E.2d 112 ("equitable estoppel generally may not be applied against the state or its agencies"); *Griffith v. J.C. Penney Co., Inc.* (1986), 24 Ohio St. 3d 112, 113, 24 Ohio B. 304, 493 N.E.2d 959 (Supreme Court of Ohio has "refused to apply principles of estoppel against the state, its agencies or its agents"); *Gold Coast Realty, Inc. v. Bd. of Zoning Appeals of the City of Cleveland* (1971), 26 Ohio St. 2d 37, 39, 268 N.E.2d 280 ("It is axiomatic that courts have historically been loathe to apply doctrines of wavier, laches or estoppel to governmental entities and arms thereof.").

[*P49] The reasons for **[**30]** this general rule are apparent. A properly functioning government cannot tolerate individual state actors binding the state to actions that exceed or contravene its authority. This court has consistently echoed the rationale for the general rule and has refused to apply promissory estoppel to contravene statutory authority. *Drake v. Med. College of Ohio* (1997), 120 Ohio App. 3d 493, 496, 698 N.E.2d 463 ("Any representations made by the president or senior vice president would be contrary to express statutory law and, thus, promissory estoppel does not apply. * * * Mistaken advice opinions or a governmental agent do not give rise to a claim based on promissory estoppel."); *Kirk Williams Co. v. Ohio State Univ. Bd. of Trustees* (June 13, 1989), Franklin App. No. 88AP-

697, 1989 Ohio App. LEXIS 2383 ("It is also well-established that public officers cannot bind the government by acts outside their express authority, even though within their apparent powers * * *.").

[*P50] However, some Ohio courts have applied promissory estoppel when the alleged promise of the state representative or agent was consistent with statutory authority. See, e.g., *Mechanical Contrs. Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 119 Ohio Misc. 2d 109, 2002 Ohio **[**31]** 3506, 774 N.E.2d 795, affirmed, 152 Ohio App. 3d 466, 2003 Ohio 1837, 788 N.E.2d 670; *State v. First, Inc.* (Apr. 3, 1990), Montgomery App. No. 11486, 1990 Ohio App. LEXIS 1326. HN24 The rational for the general rule forbidding estoppel from being asserted against the state is absent when the application of estoppel would lead to compliance with the law rather than contrary to it.

[*P51] In the case at bar, we find that the exception to the general rule does not apply because the promises upon which appellants allegedly relied are inconsistent with SERS's discretionary authority under R.C. 3309.69(B) to offer a health care plan to retirees in the first instance and/or to reallocate costs or to modify plan features. If SERS can be estopped form reallocating costs or modifying health care plan features because of alleged promises by its employees/representatives, SERS would no longer have the discretion expressly granted to it by the General Assembly in R.C. 3309.69(B). Under these circumstances, estoppel cannot be applied against SERS. This conclusion is supported by a number of decisions from this court in which we refused to apply promissory estoppel to the retirement **[**32]** systems as a matter of law. See *Sandhu v. Public Emp. Retirement Sys.* (Oct. 9, 1980), Franklin App. No. 80AP-333, 1980 Ohio App. LEXIS 13384 ("Estoppel could not be applied against the defendant in this case, as the defendant only performed its duties as defined by statute.") *McAuliffe v. Bd. of Pub. Emp. Retirement Sys.* (1994), 93 Ohio App. 3d 353, 361-363, 638 N.E.2d 617 (PERS could not be estopped from following the relevant statutory provisions despite representations of staff); *State ex rel. Shumway v. Ohio State Teachers Retirement Bd.* (1996), 114 Ohio App. 3d 280, 289, 683 N.E.2d 70 (court refused to apply estoppel to STRS, concluding that "estoppel is not applied against the state or its agencies in the exercise of a governmental function"); *State ex rel. Swartzlander v. State Teachers Retirement Bd.* (1996), 117 Ohio App. 3d 131, 136, 690 N.E.2d 36 (estoppel did not apply against STRS); *Smith v. State Teachers Retirement Bd.* (Feb. 5 1998), Franklin App. 97APE07-943, 1998 Ohio App. LEXIS 403 (estoppel cannot be used to abrogate the statutory schemes that strictly control the state retirement systems). Therefore, we conclude that the trial court did not err by dismissing appellants' claim for promissory estoppel for failure **[**33]** to state a claim. Accordingly, we overrule in part and sustain in part appellants' first and third assignments of error.

[*P52] In conclusion, we overrule appellants' second and fourth assignments of error in their entirety. We overrule appellants' first and third assignments of error to the extent that they relate to the dismissal of appellants' claims for declaratory judgment, breach of contract/specific performance, promissory estoppel, unconstitutional taking and injunctive relief. We also overrule appellants' first and third assignments of error to the extent they relate to the dismissal of that portion of their breach of fiduciary duty claim which is premised on the alleged vesting of health care benefits granted pursuant to R.C. 3309.69(B) or the deprivation of the benefit of the bargain regarding a health care plan. We sustain appellants' first and third assignments of error to the extent they relate to the dismissal of that portion of appellants' breach of fiduciary duty claim which is premised on: (1) the alleged wasting of SERS' funds in connection with the construction of the new SERS administration building; and (2) the alleged payment of **[**34]** excessive salary and bonuses to its executive director and other SERS employees. We also sustain appellees' sole assignment of error in the cross appeal. The judgment of the Franklin County Court of Common Pleas is sustained in part and reversed in part and remanded for further proceedings in accordance with law and this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

BOWMAN and McCORMAC, JJ., concur.

McCormac, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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